IN THE SUPERIOR COURT OF WHITFIELD COUNTY
STATE OF GEORGIA

MICHAEL DORAN and KAREN DORAN, Plaintiffs, v. JOHN C. B. WALL, D.C., and DALTON CLINIC OF CHIROPRACTIC, INC., Defendants.	Civil File No. 10-CI-415-B

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ORDER ON MOTION TO COMPEL

Before the court is Plaintiff's Motion to Compel. For the following reasons, the court GRANTS the motion in part and DENIES the motion in part. The court grants the motion insofar as Defendants shall disclose the identity of the investigator and shall respond to discovery requests that pertain to the facts observed by the investigator. The court denies the motion as to the other matters. However, should Defendants decide that they will use the surveillance tapes at trial, they must inform Plaintiffs of their decision and make the tapes available to Plaintiffs by the time of the pretrial hearing.

Background

This is a medical malpractice suit in which Plaintiffs allege that Defendants committed medical malpractice while one of the Plaintiffs was seeking chiropractic treatment from Dr. Wall, who is one of the defendants. Plaintiffs state they served their Second Interrogatories and Second Requests for Production of Documents requesting all surveillance videotapes of the injured Plaintiff or his family created by Defendants, along with the identity of the company and person who conducted the surveillance. Defendants responded that they had in fact conducted surveillance, but objected to the production of any further information on the basis that the information and materials sought are protected by the attorney-client privilege and the work-product doctrine, so that the materials are therefore not subject to discovery. After such response, Plaintiffs filed this pending motion. Plaintiffs have complied with U.S.C.R. Rule 6.4.

Authority and Analysis

Plaintiffs' Motion to Compel is granted as to the following grounds:

The discovery of facts observed by the investigator that is retained by Defendants is permissible. *Jones v. Scarborough*, 194 Ga. App. 468, 470 (1990). Defendants shall disclose the identity of the investigator, and shall respond to discovery requests that pertain to the facts observed by the investigator. However, only the facts are discoverable. The

investigator's conclusions or other work product shall be excluded from discovery, as well as anything that would be protected by the attorney-client privilege. Thus, any reports, notes, or surveillance tapes created by the investigator are not discoverable, as explained below.

Plaintiff's Motion to Compel is denied as to the following grounds:

Communications to any attorney or his employee is protected by the attorney client privilege. O.C.G.A. § 24-9-24. *In re Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 382 (2000). Investigators hired by attorneys have been specifically held to be considered an attorney's employee for this purpose. *See, e.g., id.* Therefore, any confidential matters regarding Defendants that the investigator may have learned in the course of this employment is protected by this privilege, and not discoverable by Plaintiffs.

Matters not protected by the attorney-client privilege still may be protected by a different doctrine, such as the attorney work-product doctrine. The attorney work-product doctrine is codified in O.C.G.A. § 9-11-26(b)(3), and provides that documents, statements, and other tangible items of evidence prepared in anticipation of litigation are considered attorney work-product. This includes evidence prepared by an employee of the attorney, under the attorney's request and direction. *McKesson HBOC, Inc. v. Adler*, 254 Ga. App. 500, 502 (2002); *see also Atlantic Coast Line R. Co. v. Daugherty*, 111 Ga. App. 144, 154 (1965).

Here, Defendants employed the investigator in direct response to actual litigation initiated by Plaintiffs. Therefore, evidence obtained and created by the investigator under the direction of the attorney in relation to this litigation is considered work product that is protected by the work-product doctrine. This includes the creation of the surveillance tapes which Plaintiffs have specifically requested in their motion. Contrary to Plaintiffs' contention, it is irrelevant whether these tapes contain mental impressions, conclusions, or legal theories. To be protected under the work-product doctrine, material need not contain mental impressions, conclusions, opinions, or legal theories of the preparer, but need only have been prepared in anticipation of litigation. *Department of Transp. v. Hardaway Co.*, 216 Ga. App. 262, 263 (1995)(overruled on other grounds); *Tobacco Rd., Inc. v. Callaghan*, 174 Ga. App. 539 (1985). Accordingly, any notes, reports, surveillance tapes, or other materials are protected by the work-product doctrine. *See Smith v. Smith*, 223 Ga. 551, 555-56 (1967).

Work-product is discoverable only in carefully limited circumstances, circumstances in which the party seeking the material can affirmatively show it "has substantial need of the materials in the preparation of [its] case and that [it] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." O.C.G.A. § 9-11-26(b)(3); *McKesson HBOC, Inc.*, 254 Ga. App. at 502.

Plaintiffs argue that they have a substantial need for these tapes because they are highly relevant to the issues and they could be impeaching. However, the mere fact that the evidence may contain impeachment material is insufficient to show substantial need or undue hardship. *Lowe's of Georgia, Inc. v. Webb*, 180 Ga. App. 755, 757 (1986); *Sturgill v. Garrison*, 219 Ga. App. 306 (1995). Plaintiffs argue they also have an interest in viewing

them to assure the material has not been altered or is not misleading. The same rationale regarding the impeachment issue applies here. Moreover, the disclosure of the tapes to Plaintiffs by the pretrial hearing would resolve this concern.

Plaintiffs also argue they cannot obtain the substantial equivalent of the tapes because the material sought is not reproducible, does not exist elsewhere, and is in the sole possession of the Defendants. While it is true that the Plaintiffs cannot go back in time and make the same exact recording, Plaintiffs are aware of exactly what is on the tapes because it is the injured Plaintiff who is on them. He knows what he did during the months of August and September 2010 (Defendants have stated that this is when the surveillance occurred). While it is true that "[t]he use of the discovery process has been held to be broadly construed, [its purpose] is to enable the parties to prepare for trial so that each party will know the issues and be fully prepared on the facts." *Travis Meat & Seafood Co., Inc. v. Ashworth*, 127 Ga. App. 284, 285-86. The purpose is also "to remove the potential for secrecy and hiding of material." *International Harvester Co. v. Cunningham*, 245 Ga. App. 736, 738 (2000). Here, because Plaintiffs know what would be on the tapes, there is no secrecy or hiding of material.

Furthermore, the law does not provide that parties are entitled to have an exact replica of the evidence, it states that the evidence is discoverable if, among other things, the requesting party cannot obtain "the substantial equivalent." Here, the person being recorded (one of the Plaintiffs) has direct personal knowledge of what was recorded. While his account of what would be on the tape is not the exact same as videotape recording of what occurred, he knows what is on the tape and can communicate this to his counsel to help build their case. In these circumstances, denying the motion as to this respect ensures the protection of the work product while not violating the general purposes of discovery. *International Harvester Co. v. Cunningham*, 245 Ga. App. 736, 738 (2000); *Travis Meat & Seafood Co., Inc. v. Ashworth*, 127 Ga. App. 284, 285-86 (1972).

Accordingly, the materials created by the investigator, including the surveillance tapes, are protected by the work-product doctrine. Plaintiffs have not met their burden that they have a substantial need of the materials and are unable without undue hardship to obtain the substantial equivalent of the materials by other means. Nevertheless, should Defendants decide that they will use the surveillance tapes at trial, they must inform Plaintiffs of their decision and make the tapes available to Plaintiffs by the time of the pretrial hearing. Defendants have already communicated to Plaintiffs and the court their willingness to do this.

So **ORDERED**, this 13th day of May, 2011.

William T. Boyett
J. S. C. C. C.

cc: Richard Griggs, Attorney for Plaintiffs
M.B. Satcher, III, Attorney for Defendants